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Supreme Court, U.S.
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No. 00-1301

In The

Supreme Court of the United States

JANE ROE, II,

Petitioner,

v.

AWARE WOMAN CENTER FOR CHOICE, INC., A FLORIDA CORPORATION, EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, and WILLIAM P. EGHERMAN, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondents object to Petitioner's Questions Presented and offer the following as the correct issues to be considered on the Petition for Certiorari.

1. Whether this case is of such public importance as to justify deviation from normal appellate practice and to require immediate determination of the Supreme Court pursuant to Supreme Court Rule 11 and 28 U.S.C. § 2101(e).

2. Whether the District Court was correct in dismissing Petitioner's Complaint for failing to state a cause of action under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.

3. Whether the District Court was correct in denying the Petitioner's motion to proceed anonymously.

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation of Respondent, Aware Woman Center for Choice, Inc. and no publicly held company owns shares in the corporation.

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BRIEF IN OPPOSITION

Respondents Aware Woman Center for Choice, Inc., Edward W. Windle, Jr., and Patricia B. Windle respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The Respondents object to Petitioner's Statement of the Case because it is factually incorrect, it contains irrelevant material, and it does not set out facts necessary to consideration of the questions presented. The Respondents, therefore, offer their own Statement of the Case.

This case is brought pursuant to the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"). Jane Roe II ("Roe") claims that Aware Woman Center for Choice, Inc., Edward Windle, Patricia Windle, (collectively "Aware Woman") and William Egherman, M.D., violated FACE when they took measures to protect her health during an abortion procedure where complications developed.

Course of Proceedings and Disposition Below

On July 9, 1999, Roe filed her complaint in the United States District Court for the Middle District of Florida, Orlando Division. The complaint alleged that Aware Woman and Dr. Egherman violated FACE on March 29, 1997 when they restrained her during an abortion procedure where complications had developed. Roe sought

compensatory and punitive damages in excess of one million dollars.

Dr. Egherman and Aware Woman filed motions to dismiss the complaint on August 3, 1999 and August 16, 1999, respectively. These motions were based on the fact that the allegations of the complaint did not state a claim under FACE.

Aware Woman also filed a motion to strike redundant, immaterial, impertinent and scandalous matters from Roe's complaint. This motion was based on Roe's repeated use of inflammatory statements related to the abortion procedure and clinic personnel.

Roe initially filed the complaint using a pseudonym. Thereafter, on November 11, 1999, at the direction of the district judge, Roe filed a motion to proceed anonymously.

On January 3, 2000, the district court dismissed the complaint, with leave to file an amended complaint, because Roe failed to allege any intent or motive on the part of the defendants to interfere with or prevent her from obtaining reproductive health services. The court also denied Roe's motion to proceed anonymously, finding that Roe's privacy concerns did not overcome the "presumption of openness in judicial proceedings." Finally, the court denied, as moot, Aware Woman's motion to strike, but cautioned Roe to comply with the Federal Rules of Civil Procedure requiring a short and plain statement of the claim in the event an amended complaint was filed.

Roe did not file an amended complaint. She filed her notice of appeal with the United States Court of Appeals for the Eleventh Circuit on January 12, 2000. The parties filed briefs and the Eleventh Circuit heard oral argument on November 3, 2000. To date, the Eleventh Circuit has not reached a decision on the appeal.

Statement of Facts

On March 29, 1997, Roe voluntarily came to the Aware Woman clinic to have an abortion. This was Roe's third abortion at the Aware Woman clinic. When Roe arrived she went through the normal checkin process prior to the procedure. During the procedure, complications arose. Roe requested that an ambulance take her to a local hospital emergency room. Dr. Egherman and the other clinic personnel continued to provide medical care to Roe in response to the complications that arose. In addition, an ambulance was called to take Roe to a local hospital emergency room. Roe was taken to the emergency room where she received further treatment.

Roe alleged in her complaint that Dr. Egherman and Aware Woman's actions violated FACE because they prevented her from immediately leaving the clinic during the abortion procedure after the complications had developed.

THIS CASE IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE TO REQUIRE A DEVIATION FROM NORMAL APPELLATE PROCEDURE

On January 12, 2000, Roe filed an appeal of the District Court's decision with the United States Court of Appeals for the Eleventh Circuit. Oral argument was heard before the Eleventh Circuit on November 3, 2000 and the parties await a decision. The Petitioner, however, requests that the Supreme Court review the District Court's decision before the Eleventh Circuit rules.

Supreme Court Rule 11, pursuant to 28 U.S.C. § 2101(e), provides that:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative importance as to justify deviation from normal appellate procedure and to require immediate determination in this Court.

This basis for jurisdiction before the Court is rarely granted and when it is it involves matters of national public importance. *See Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 41 L.Ed.2d 1039 (1981) (involving challenges to the resolution of the Iran hostage crisis); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 918 (1974) (involving the investigation of illegal executive and Presidential matters with certiorari granted before judgment by the Court of Appeals because of the public importance of the issues presented and the need for their prompt resolution).

Roe offers no legal precedent, coherent argument, or reasonable interpretation as to why her petition for a writ

of certiorari should be granted before the Eleventh Circuit rules. In fact, she confuses the issues considerably by intermingling allegations with the standard necessary to review a matter before the court of appeals issues a decision.

The threshold question, before considering the District Court's decision on certiorari, is whether Roe's claim is of "imperative public importance." Roe's complaint simply alleges violations of a federal statute and resulting money damages for those violations. Her arguments on "public importance" relate to her disdain for court rulings and abortion in general but never discuss how review of the court's decision in her case is of "imperative public importance."

Roe fails to address any of the requirements mandated by Supreme Court Rule 11, and, therefore, her petition for writ of certiorari should be denied.

THE DISTRICT COURT WAS CORRECT IN DISMISSING PETITIONER'S COMPLAINT FOR FAILING TO STATE A CAUSE OF ACTION UNDER THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT, 18 U.S.C. § 248

This action was brought pursuant to the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"). 18 U.S.C. § 248. FACE provides in relevant part as follows:

> (a) Prohibited activities. – Whoever –
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates

> or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> . . .
>
> shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c). . . .

In *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), the court recognized that Congress passed FACE "in response to increasing incidents of violence and obstruction at abortion clinics." *Cheffer*, 55 F.3d at 1519. The acts of violence noted by Congress "included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic 'invasions,' and one murder." S.Rep. No. 117, 103 Cong. 1st Sess. 3 (1993). The stated purpose of the act is "to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services." *Cheffer*, 55 F.3d at 1519.

The Elements of a FACE Claim

In interpreting FACE, courts have discerned three elements necessary to establish a violation of the statute. The first element requires that the defendant physically obstruct, or attempt to obstruct, someone's access to a

reproductive health facility.[1] *United States v. Wilson*, 2 F. Supp. 2d 1170, 1171 (E.D. Wisc. 1999), *aff'd, United States v. Balint*, 201 F.3d 928 (7th Cir. 2000). Roe alleges in her complaint that the defendants prevented her from leaving the clinic by restraining her during the abortion procedure. The district court found that viewing this allegation in favor of the plaintiff, it alleged facts sufficient to show that her egress from the clinic had been obstructed. However, the court correctly determined that this element alone cannot support a violation of FACE.

The second element requires that the defendant intend by his obstruction to "interfere with or attempt to interfere with persons attempting to gain entrance or egress to said clinic." *Wilson*, 2 F. Supp. 2d at 1171. The third element requires that the defendant possess a particular motive. The intent to interfere with entrance or egress to a clinic must be with the "express purpose of preventing such persons from obtaining or providing reproductive health services." *Id.* Courts have noted that this motive requirement makes FACE unique in that most criminal statutes require only an act and an intent to so act. *See United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996); *Wilson*, 2 F. Supp. 2d 1170; *United States v. Scott*, 958 F. Supp. 761 (D. Conn. 1997).[2]

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[1] A "reproductive health facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services. 18 U.S.C. § 248 (e)(1).

[2] The elements of a cause of action under FACE are the same whether criminal or civil remedies are being pursued. *Greenhut v. Hand*, 996 F. Supp. 372, 378 n.4 (D.N.J. 1998).

The motive requirement of FACE was explained by the court in *Dinwiddie* as follows:

> What FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute. Congress enacted FACE to prohibit conduct that interferes with the ability of women to obtain abortions. See H.R.Rep. No. 306, at 12; S.Rep. No. 117, at 23. FACE's motive requirement targets this conduct while ensuring that FACE does not federalize a slew of random crimes that might occur in the vicinity of an abortion clinic.

Dinwiddie, 76 F.3d at 923. The court likened FACE's motive requirement to the motive requirement of Title VII of the Civil Rights Act of 1964 which requires an employer's discriminatory act be "because of [the employee's] race, color, religion, sex or national origin." *Id.* Discrimination without the requisite motive does not violate Title VII. Likewise, obstruction without the requisite motive does not violate FACE.

Recently, the United States District Court for the Northern District of New York explained that the intent requirement of FACE is necessary to prevent the application of FACE to circumstances where it clearly is not meant to apply. As an example, the court stated:

> Plaintiff's interpretation of FACE's *mens rea* standard (such that one only need show obstruction to prove intent) could lead to ridiculous results. . . . Similarly, if a bomb threat required immediate evacuation of a reproductive clinic, individuals escorting patients and medical service providers out of the facility

> and/or preventing individuals from entering the facility could be liable under FACE. Contrary to Plaintiff's assertions, in these circumstances, the fact that an individual physically obstructed or literally interfered with provision of reproductive services would not suffice to establish a violation of FACE as the obstruction or interference was because of a threat to patients and providers safety rather than because the patients were receiving and the providers providing reproductive services.

Sharpe v. Conole, 123 F. Supp. 2d 87, 90 (N.D.N.Y. 2000).

Roe's Complaint

In this case, Dr. Egherman's and Aware Woman's acts were not intended to interfere with Roe's egress from the clinic in order to prevent her from obtaining an abortion. On the contrary, to the extent that Roe was restrained it was not intended to interfere with her leaving the clinic but rather to prevent further harm to her during the procedure. The defendants' purpose was not to prevent her from obtaining an abortion but to enable the doctor to complete the voluntary abortion procedure that had already begun and address the medical complications that had developed. This intent and motive is demonstrated in Roe's complaint by the allegation that after the complications arose clinic personnel and the doctor were attempting to insert an IV and otherwise provide medical treatment. The only reasonable inference from the facts alleged in the complaint is that Dr. Egherman and the clinic personnel were faced with a medical emergency and were taking those steps necessary to protect the

safety of the patient. Roe's conclusion that the defendants' acts were intended to prevent her from leaving the clinic and obtaining an abortion elsewhere simply is not reasonable given the facts. The acts were clearly intended to protect the health and safety of Roe during an abortion procedure, not prevent her from obtaining an abortion. As the court in *Sharpe* explained, such actions are not meant to come within FACE's prohibitions.

FACE is intended to protect abortion providers and patients against violence and threats of violence from persons who want to prevent abortions. Roe's complaint is an attempt to use FACE as a sword against people providing reproductive health services, the very people it was intended to protect. Roe was in the process of obtaining an abortion. Aware Woman and Dr. Egherman were in the process of providing the abortion. No one involved in the process had any motive to prevent Roe from obtaining the abortion. Thus, FACE clearly does not apply and cannot be invoked in this manner.

At most, Roe is alleging that the medical care she received at the clinic resulted in her injuries. In other words, she claims medical malpractice.[3] FACE clearly was not intended to federalize the medical malpractice field. Medical malpractice is one of the "slew of random

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[3] Aware Woman adamantly maintains that the care Roe received at the clinic met the standard of care required of doctors, clinics, and other personnel performing abortion procedures and that any malpractice claim by Roe is completely without merit. Furthermore, any malpractice claim would be barred by the applicable statute of limitations set forth in Fla. Stat. Ann. § 95.11, which may explain Roe's use of a clearly inapplicable federal law to seek damages.

[acts]" that might occur at an abortion clinic that were not intended to fall within the prohibitions of FACE. Thus, the district court was correct when it dismissed Roe's complaint and certiorari should be denied.

THE DISTRICT COURT WAS CORRECT IN DENYING THE PETITIONER'S MOTION TO PROCEED ANONYMOUSLY

Roe filed a motion to proceed anonymously in this matter, alleging that information of the "utmost intimacy" would be disclosed during the proceeding. Presumably, the information of the "utmost intimacy" which would be disclosed is the fact that Roe was allegedly injured during an abortion procedure.

Any review of a motion to proceed anonymously must begin with the general rule that parties to a lawsuit must identify themselves in their respective pleadings. *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992). *See* Fed. R. Civ. P. 10(a) (requiring a complaint to include the names of all parties). The court recognized in *Doe v. Frank* that the "rule serves more than administrative convenience. It protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." *Frank*, 951 F.2d at 322. Thus, it is only appropriate in exceptional cases to allow a plaintiff to proceed anonymously. *Id.* at 323.

The ultimate test in determining whether the plaintiff may proceed anonymously is whether the plaintiff has a substantial privacy right that outweighs the presumption of openness in judicial proceedings. *Id.* Review of the

cases authorizing the use of fictitious parties reveals certain common circumstances. *See Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981); *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979). These circumstances are: (1) plaintiffs challenging governmental activity; (2) plaintiffs required to disclose information of the utmost intimacy; and (3) plaintiffs compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution. *Frank*, 951 F.2d at 323, *citing Stegall*, 653 F.2d at 185. These factors are not intended as a rigid, three-step test, but are highlighted as factors deserving attention. *Frank*, 951 F.2d at 323.

In *Wynne & Jaffe*, the plaintiffs included certain individual attorneys who wished to proceed anonymously in the sex discrimination lawsuit filed against a local law firm. The attorneys alleged that they would suffer socially and economically if it was generally known that they were parties to the lawsuit. *Wynne & Jaffe*, 599 F.2d at 711. In denying the motion to proceed anonymously, the court noted that prior cases authorizing anonymity involved parties challenging the constitutional, statutory or regulatory validity of governmental action. In contrast, this case involved a civil action against another private party where "the mere filing of [such an action] against other private parties may cause damage to their good names and reputation and may also result in economic harm. Defendant law firms stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants' accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names." *Id.*

In *Stegall*, the issue raised was the constitutionality of prayer and Bible reading exercises in schools. The court held that the challenge to the governmental activity relating to religion, as well as evidence of harassment and violent reprisals, satisfied the conditions necessary to proceed anonymously. *Stegall*, 653 F.2d at 186. The court also noted as significant that the plaintiffs in this case were children. *Id.*

In *Frank*, the plaintiff sued his employer for employment discrimination, claiming he was wrongfully fired because of his alcoholism. It was the fact that he was an alcoholic that the plaintiff advanced as the substantial privacy interest worthy of protection. However, the court held that the fact that one may suffer some personal embarrassment, standing alone, does not justify proceeding under a pseudonym. *Frank*, 951 F.2d at 324. In so ruling, the court held that:

> Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough. This case does not present such an unusual situation in which the need for party anonymity outweighs the presumption of openness. Therefore, the district court did not abuse its discretion in denying Doe's motion.

Frank, 951 F.2d at 324.

In this case, Roe alleges that because the suit involves alleged injuries received during an abortion procedure, anonymity should be allowed. There is certainly no rule that all cases involving abortion may proceed anonymously. Roe relies on the case of *Thornburgh v. American College*, 476 U.S. 747, 106 S.Ct. 2169, 90 L. Ed. 2d 779 (1986) to support her position that abortion cases must proceed anonymously. First, this case has been overruled by *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L. Ed. 2d 674 (1992). Second, the issue in *Thornburgh* was not whether a party could proceed anonymously in a lawsuit filed in the federal courts but rather the validity of state reporting requirements related to abortions. The fact that the Court has recognized that abortion may be a private matter, as may be any medical procedure, does not require that parties to a lawsuit involving abortion be allowed to proceed anonymously.

Those cases involving abortion that have proceeded anonymously, *e.g., Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L. Ed. 2d 147 (1973); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975); *Doe v. General Hospital*, 434 F.2d 427 (D.C. Cir. 1970), involved a challenge to governmental activity that required the plaintiff to admit to engaging in illegal activities, in addition to revealing the fact that the plaintiff requested or had an abortion. *Wynne & Jaffe*, 599 F.2d at 713.

Quite unlike the above cases, Roe is seeking money damages against private individuals alleging injuries received during a legal medical procedure. Claims of alleged medical malpractice involving abortions do not routinely proceed anonymously. *See e.g., Adams v. Family Planning Assoc. Med. Group, Inc.*, 733 N.E.2d 766 (Ill. App.

2000) (involving wrongful death claim arising out of an abortion procedure); *Greene v. Legacy Emanuel Hospital and Health Care Center*, 997 P.2d 265 (Or. App. 2000) (involving medical malpractice claim where plaintiff's colon was perforated during an abortion). While it may be embarrassing to admit to an abortion, such embarrassment is not enough to outweigh the presumption of openness in judicial proceedings. This is especially true where the allegations of the lawsuit impugn the professional reputations of private individuals engaged in lawful activity and whose identities are fully exposed by the plaintiff's lawsuit.

The district court acted well within its discretion in denying Roe's motion to proceed anonymously. Certiorari should be denied on this issue also.

CONCLUSION

Roe's appeal is not of imperative public importance and, therefore, certiorari should not be granted in deviation from normal appellate practice. Additionally, the District Court was correct in dismissing Roe's complaint because she failed to state a claim under the FACE Act and holding that Roe could not proceed anonymously.

Based on the foregoing, Aware Woman Center for Choice, Inc., Edward W. Windle, Jr. and Patricia B. Windle respectfully request that the Court deny Roe's petition for a writ of certiorari.

Respectfully submitted,

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